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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. [redacted]90

OLIVER ARSENAULT, FRANK FAZEKAS, WILLIAM PISTEY and MATTIE L. SYKES,
Petitioners,

vs.

GENERAL ELECTRIC COMPANY,
Respondent.

On Petition For a Writ of Certiorari to the Supreme Court of Errors of the State of Connecticut.

BRIEF FOR RESPONDENT IN OPPOSITION.

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vs.

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On Petition For a Writ of Certiorari to the Supreme Court of Errors of the State of Connecticut.

BRIEF FOR RESPONDENT IN OPPOSITION.

OPINION BELOW.

The opinion of the Supreme Court of Errors of the State of Connecticut is reported at 147 Conn. 130, 157 A. 2d 918 (1960). It appears in the Appendix to the Petition at pages 12-14 inclusive.

The Memoranda of Decision of the Connecticut Superior Court for Fairfield County have also been

printed in the Appendix to the Petition at pages 16 et seq and 21 et seq. It should be noted that the first Memorandum of Decision (Appendix, p. 16) was superseded by the second Memorandum of Decision (Appendix, p. 21), the plaintiffs having pleaded over, and, accordingly, has no proper place in this Record.

QUESTIONS PRESENTED.

Respondent objects to the form and content of petitioners' questions presented, and therefore submits the following questions in lieu thereof.

1. Whether the federal statutory proviso to Section 9 (a) of the Labor Management Relations Act, 1947, (61 Stat. 136, 29 U.S.C. Section 159), which permits employees "to present grievances to their employer and to have such grievances adjusted" gives employees the power to compel arbitration of their dismissal under a collective bargaining agreement wherein the parties have agreed to arbitration only at the request of the Union?

2. Where the collective bargaining agreement expressly gives only the Union the right to request arbitration, do individual employees have the power to compel arbitration when the Union has simply declined or failed to request arbitration and the employees claim that such refusal was a breach of the duty owed to them?

STATUTES INVOLVED.

Sections 8151 and 8153 of the General Statutes of Connecticut, Revision of 1949, under which the suit was instituted, are set out at pages 3 and 4 of the Petition. The federal statutory provisions which petitioners assert are involved, but which were not alleged as a ground for the complaint or substituted complaint in the Superior Court, are Sections 7 and 9 (a) of the Labor-Management Relations Act, 1947, 61 Stat. 136, 29 U.S.C.A. §§157, 159. These appear at pages 2 and 3 of the Petition.

STATEMENT OF THE CASE.

At pages 4 and 5 of the Petition, petitioners set out their claims as to facts admitted by respondent's Demurrer. Respondent disagrees with these claims. Only facts, well pleaded, are admitted by a Demurrer. Statements of opinions held by petitioners or petitioners' characterizations of action taken or not taken by the Union or the Company are not admitted as being anything more than statements of claims and opinions. Thus, the Supreme Court of Errors of the State of Connecticut has stated "the material allegations of the amended complaint, which are admitted for the purposes of the demurrer" as follows:

> "The material allegations of the amended complaint, which are admitted for the purposes of the demurrer, follow. Since 1955, the union, in conjunction with its locals, has been the exclusive bargaining representative of the employees at the defendant's Bridgeport plant.

The four plaintiffs were employed at the plant. All were members of the local. Two were members of the union and the local. Three of the plaintiffs were suspended in 1956 from their employment by the company. They requested the local to process their grievances under the provisions of the collective bargaining agreement. The local refused. The three then met with company management. Representatives of the union local attended the meeting but did not participate. The defendant advised the three plaintiffs that the suspensions would stand and that further steps under the grievance procedure would be futile. Thereafter, the three were discharged. Within a short time, the fourth plaintiff was suspended and then discharged.

"The agreement (art. 13) provides a three-step grievance procedure. Individual grievances cannot be processed otherwise. The first step is at the shop level, the second at the local management level, and the third at the headquarters or national level. The employee or his steward can initiate the grievance at the first step. If the matter is not settled, the local may proceed with it on through the second step. If the grievance is still unsettled, it can, at the third step, be referred to the national officers of the union for discussion with executives of the company. The agreement further provides (art. 15) that it is to be construed according to the law of the state of New York and that grievances, including unjust discharges, remaining unsettled after full processing under the grievance procedure are to be submitted to arbi-

tration on the written request of either the union or the company. Neither the local nor the union has processed the plaintiffs' grievances, and the union has not sought arbitration."

Appendix, Pages 12 and 13 of Petition.

This is the authoritative statement of facts admitted by the Demurrer and is controlling. To the extent that Petitioners' claims of facts admitted by the Demurrer, i.e., a breach of duty of fair representation on the part of the Union, go beyond the statement of admitted facts as set forth by the Supreme Court of Errors in its Opinion below, they should be disregarded.

The Supreme Court of Errors of the State of Connecticut clearly decided this case on the single ground that, by the terms of the collective bargaining agreement, the parties have provided for arbitration of certain grievances at the request of the Union or the Company alone, that no provision is made therein for arbitration at the request or demand of an employee and that, in the absence of such a provision in the Contract, the plaintiffs cannot compel the defendant to arbitrate. (Opinions, Page 14 of Petition.)

It should be pointed out that the Amended Complaint (R., p. 13) expressly seeks arbitration "in accordance with said (the Collective Bargaining) Agreement."

ARGUMENT.

I.

The Decision of the Supreme Court of Errors of the State of Connecticut Was Correct.

Respondent respectfully submits that this Court should refuse a writ of certiorari for the reason that the decision of the Supreme Court of Errors of the State of Connecticut was unquestionably correct.

The highest Courts of both Connecticut and New York have pointed out that the sole function of their arbitration statutes is to make legally enforceable an agreement which the parties have made and that the **only** agreement which will be enforced by the Court is the agreement which the parties themselves have made.

See: O'Sullivan, Jr. in **Teamsters Union v. Shapiro,** 138 Conn. 57, 62, 63; Mellitz, J. in **Colt's Industrial Union v. Colt's Mfg. Co.,** 137 Conn. 305, 307, following **Marchant v. Meade-Morrison Mfg. Co.,** 252 N.Y. 284, 299; **Matter of Berkovitz v. Arbib, Inc. and Houlberg,** 230 N.Y. 261, 269; and **Webster v. Van Allen,** 217 App. Div. 567 (N.Y.).

The question of the right of an individual employee to require arbitration by the employer under a collective bargaining agreement which limits and reserves such right to the union has come before many courts and has been universally decided

against the existence of any such individual right. The Supreme Court of Errors of Connecticut followed a rule of law established in many other cases.

In **Parker v. Borock,** 5 N.Y. 2d 156, 161, 156 N.E. 2d 297 (1959), the Court of Appeals of the State of New York (Opinion by Burke, J.) stated the matter clearly and concisely as follows:

> "Plaintiff is a member of the union and, therefore, is bound by the agreement. By its terms, the collective bargain 'inured' to the members of the union (**Ott v. Metropolitan Jockey Club,** 282 App. Div. 946, affd. 307 N.Y. 696). In the **Ott** case, as here, the employee could not avail himself of the arbitration procedure since that right was granted only to the union and the employer by the terms of the collective agreement. Hence, plaintiff here is bound by and limited to the provisions of the agreement. (See, also, **Triboro Coach Corp. v. State Labor Relations Bd.,** 286 N.Y. 314; **Barth v. Addie Co.,** supra; **Rolandez v. Star Liq. Dealers,** supra). x x x
>
> "A reading of the existing agreement indicates that plaintiff has entrusted his rights to his union representative. It may be that the union failed to preserve them. As was said in **Donato v. American Locomotive Co.,** (283 App. Div. 410, 417, affd. 306 N.Y. 966): 'The only conclusion which logically follows is that the employee is without any remedy, except as against his own union, if he claims that the union mishandled the arbitration proceeding or improperly failed to move to vacate the award.

If this conclusion is reached upon the premise here set forth, this is not an exaltation of procedure over substance; it rests rather upon a proposition of substantive law limiting the right of the individual employee under a collective bargaining agreement.' "

Fuld, J. (concurring) said, p. 162:

"I agree with the conclusion reached by the court and, in the main, with Judge BURKE'S opinion. However, because I believe that the result is dictated as much by policy considerations as by the language of the collective bargaining agreement, I would add these few words.

"Discharge cases arise in the course of the daily administration of a collective bargaining agreement. They may raise countless questions, such as interpretation of the collective bargaining agreement, reasonableness of plant rules and regulations and conformity with past practices. The exclusive representative is in the best position, after investigating the truth and merits of the employee's complaint and after weighing the many factors involved, to determine whether uniformity in the administration of the agreement and protection of the group interests of the majority of the employees require it to press or abandon the case. Accordingly, absent specific language giving the employee the right to act on his own behalf, it is my conclusion that under a collective bargaining agreement such as the one before us—which contains provisions for the submission of unsettled disputes

to arbitration—the union alone has a right to control the prosecution of discharge cases. (See Cox, Rights Under A Labor Agreement, 69 Harv. L. Rev. 601, 648-652).

"To the contention that this may subject the individual employee to capricious or discriminatory action by the union, it is sufficient to observe, as Judge Burke has noted, that the employee has a remedy against the union for breach of fiduciary duty if it unfairly discriminated against him. (See, e.g. **Donato v. American Locomotive Corp.**, 306 N.Y. 966 affd. 283 App. Div. 410, 417, **Conley v. Gibson**, 355 U.S. 41, 45 et seq.)."

The rule which was followed in the **Parker** case and the reasoning behind it are well stated by Judge Eder in **Cox v. R. H. Macy & Co.**, 152 N.Y.S. 858, 30 Labor Cases ¶69,869.* In that case the Court refused to order arbitration by the Company on the

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*To the same effect are:
Calka v. Tobin Packing Co., 192 N.Y.S. 2d 886;
United States v. Voges, D.C. 124 F. Supp. 543;
Matter of Brettner, 9 Misc. 725, 168 N.Y.S. 2d 180;
Item Co. v. New Orleans Newspaper Guild, 256 F. 2d 855, cert. den. 358 U.S. 867, 79 S. Ct. 98, 3 L. Ed. 2d 99;
In Re Sholgen, 116 N.Y.S. (2d) 165;
Curet v. Landriscina, (Sup. Ct., Bronx Co.—N.Y., 1956), 135 N.Y.L.J. 8, (May 22, 1956), 30 Labor Cases ¶70,082;
Doyle v. Lasorda, (Sup. Ct., N.Y. Co.—N.Y., 1956), 135 N.Y.L.J. 7, (May 4, 1956), 30 Labor Cases ¶69,937;
Trimarchi v. Sheffield Farms, (Sup. Ct., N.Y. Co.—N.Y., 1956), 161 N.Y.S. 2d 558, (Sup. Ct., App. Div., Jan. 15, 1957—no opinion, appeal dismissed), 136 N.Y.L.J. 3 (July 16, 1956), 30 Labor Cases ¶70,116;
Kaufman v. Local 64, (Sup. Ct., N.Y. Co.—N.Y., 1948), 119 N.Y.L.J. 507, (Feb. 9, 1948), N.Y. Sup. Ct., 14 Labor Cases ¶64,376;

application of an employee where the Union had refused to request arbitration. The Court said:

> "Whatever the rights petitioner may assert in view of the impasse occasioned by her union's refusal to demand arbitration, she may not compel arbitration against the employer's wishes. **The employer has contracted to submit to an arbitration when demanded under the terms of the agreement by the union as the representative of its employees.** To direct arbitration upon request of individual employees, when their union has refused to demand arbitration, would create an unstable and chaotic condition not conducive to industrial harmony, **as well as violation of the clear statement in the collective bargaining agreement of the parties who may demand arbitration.**" (Emphasis added.)

A very recent Pennsylvania case, **Frank Falsetti, Appellant v. Local No. 2026, United Mine Workers of America, et al, Appellees,** (Pennsylvania Supreme Court, Western District, June 3, 1960), 40 Labor Cases ¶66,590, cites and follows **Parker v. Borock, supra.** In the **Falsetti** case the Court held that, under the language of the applicable bargaining agreement an individual employee could not sue his employer for breach of contract, since the parties did not intend to permit such actions, but that the

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Bianculli v. Brooklyn Union Gas Co., 115 N.Y.S. (2d) 715;
DeRienzo v. Farrand Optical Co., 148 N.Y.S. (2d) 587;
Donato v. American Locomotive Co., 283 App. Div. 410, 25 Labor Cases ¶68,142, affirmed 306 N.Y. 966;
Synn v. Cities Service Oil Co., (Pa. Ct. of Common Pleas, Feb. 4, 1960), 60 ALC 759, 39 Labor Cases ¶66,323;
69 Harvard Law Review 601;
66 Yale Law Journal 496.

union was to be the sole party with capacity to bring a contract dispute.

The Court said (pages 70,700 and 70,701 of 40 Labor Cases):

> "A collective bargaining agreement, it is important to note, is simply a contract, and any rights and remedies the appellant possesses must be derived solely from the Agreement itself. x x x
>
> "It should be noted that after the first step in the five outlined in the grievance procedure, the complaint is to be processed by representatives of the Union. The ultimate responsibility in discharge cases is thereby left not to individual members, but rather to their trustee in these matters. The result we reach thus flows as a matter of course from the face of the Agreement. In effect, the appellant is a beneficiary of the appellee Company's promises as to seniority rights, but the Company has limited those promises by refusing to entertain claims based on such rights (beyond the initial complaint stage) unless brought by the other party to the Agreement, the trustee Union. The limited character of the Company's promises serves to defeat any attempt to get redress individually.[29]"

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[29] "Three important jurisdictions have recently arrived at the same result: **Parker v. Borock** (N.Y. 1959), **supra**; **Cortez v. Ford Motor Co.** (Mich., 1957), **supra**; **Jorgensen v. Penna. R. Co.** (N.J., 1958), **supra**; **U. S. v. Voges**, 124 F. Supp. 543 [26 Labor Cases ¶68,638] (E.D. N.Y. 1954) Cf. **McMenamin v. P.T.C.**, 356 Pa. 88, 51 A. 2d 702 (1947). x x x "

The Court (Cohen, J.) then discusses the policy argument behind the rule placing enforcement responsibility in the labor organization concerned, quotes the language of Judge FULD at page 162 of the Opinion in **Parker v. Borock** (quoted at page 8 of this Brief) and says:

> "With this approach we wholeheartedly concur."

Other cases on this subject from many jurisdictions are extensively reviewed in **Jenkins v. Schluderberg-T. J. Kurdle Co.**, 217 Md. 556, 144 A. 2d 88.

So, also, it has been held that the individual employee may not initiate proceedings to vacate an arbitration award.

McCaffrey v. United Aircraft Corp., Conn. Supreme Court of Errors, Feb. 2, 1960, XXII Conn. Law Journal 5, 60 ALC 401.

Soto v. Lenscraft Optical Corp (Rayex), N.Y. Court of Appeals, March 3, 1960, 60 ALC 835, 7 N.Y. 2d 397.

Clearly, the Supreme Court of Errors of the State of Connecticut followed well-established rules and principles of law in arriving at its unanimous decision in this case.

II.

The Supreme Court of The United States Should Not Review the Decision of The Supreme Court of Errors of the State of Connecticut Because the Petition For Writ of Certiorari Does Not Establish Special and Important Reasons For So Doing.

1. This case involves no new or novel proposition of law which would justify a review by the United States Supreme Court. As hereinbefore and hereinafter demonstrated, there is complete unanimity among the various Federal and State Courts which have passed upon the questions raised by this Petition. We again call the attention of the Court to the fact that, despite the claim of dereliction of duty advanced at Page 6 of the Petition, the Connecticut Supreme Court of Errors found no such dereliction of duty in its statement of facts admitted by the Demurrer. (See **Appendix, Pages 12 and 13 of the Petition**).

As to the Section 9(a) argument, the Connecticut Supreme Court of Errors said:

> "The proviso in this section does no more than to assure to the employee the right to present his grievance directly to his employer to see if it can be settled. Three of the four plaintiffs in this case have availed themselves of this right."

In deciding this case as it did, the Court below followed a long line of authorities and advanced no new proposition of law which would justify a review by this Court.

2. The claim that Section 9(a) of the Labor-Management Relations Act, 1947, guarantees to every individual member of a group represented for purposes of collective bargaining by a Union the right to require arbitration of a dispute by his employer, even though the Collective Bargaining Agreement made on behalf of all of the employees places this right only in the hands of the Union, is completely without merit, has not been supported by any Court despite the numerous cases involving the right of an employee to require arbitration which have come before the Courts over the past decade, and is based solely on some dicta contained in **Hughes Tool Company**, 56 NLRB 981, and in **Hughes Tool Company v. NLRB**, 147 F. 2d 69, both decided prior to the amendment of the National Labor Relations Act. Petitioners frankly admit that there are no cases holding their view to be the law.

What the Petitioners' claim amounts to, in effect, is to say that, whatever agreement the Union and the employer may have entered into regarding arbitration, if there is any agreement whatever as to arbitration (which, of course, the parties are free to leave out of their collective bargaining agreement), the Federal law has imposed a system of compulsory arbitration on the employer at the option of the employee. Petitioners' argument goes this far and merely to state it is to show its absurdity.

Petitioners' argument at Page 7 of the Petition completely fails to recognize the distinction between the right to present grievances, which is guaranteed by statute, and the claimed "right" to demand arbitration, which, if it exists at all, exists only because

the parties have voluntarily created it by the terms of their Collective Bargaining Agreement. The parties may, if they please provide for no arbitration; they may, if they so desire, provide for limited arbitration, covering only specific grievances; they may provide for arbitration at the request solely of the Union or at the request solely of the Company; or they may provide for arbitration at the request of the employee. The important fact in each case is that whether there is to be any arbitration, and the extent to which arbitration is to be afforded, is a matter of agreement between the parties. Arbitration is not a necessary step in grievance procedure. Congress knew the difference between the right to present grievances and the right to demand arbitration and had it intended to create the latter right would have used apt language to do so.

The present Contract is an excellent example of a contract which clearly distinguishes between and separates Grievance Procedure and Arbitration. Grievance Procedure (set out in Article XIII) involves an attempt by the employee or his representative and the employer to reach an adjustment of a grievance voluntarily and without the intervention of a third party. When all efforts to reach an adjustment have failed, when the steps of the Grievance Procedure have been exhausted without an "adjustment" having been reached, then a different procedure applies. This applies only because the employee or his representative and the employer have not been able to reach an adjustment and at this point the Union is given the right to demand that a third party, the arbitrator, decide which contention is correct.

The claim here advanced by Petitioners has been advanced in three cases and has been overruled in all. In **Aaron Ostrofsky v. United Steelworkers of America et al,** 171 Fed. Supp. 782, (U.S.D.C., Md., 1959), affirmed by the United States Circuit Court of Appeals, 4th Circuit, at 237 F. 2d 615, plaintiffs (employees) sued the Union and the Company for damages for wrongful discharge and refusal to arbitrate. The Court, speaking through Chief Judge Thomsen, states (page 789) that "plaintiffs base their claims against Bethlehem solely on their alleged rights under the Agreement between Bethlehem and the Union, and base their claims against the Union on the duty to represent all employees fairly and without discrimination, imposed on it by sec. 9 (a) of NLRA, 29 U.S.C.A. 159 (a), in the light of **Steele v. Louisville & N. R. Co.,** 323 U.S. 192, 198-199, and **Ford Motor Co. v. Huffman,** 345 U.S. 330, 337."

The Court then said, page 791:

> "Article XII provides that Bethlehem, before discharging an employee, shall give him written notice of its intention. The employee may then request a hearing before an official of the company. Such a hearing was held in the instant case. **The proviso in NLRA sec. 9 (a), 29 U.S.C.A. 159 (a), requires no more, if it requires that.** Cox, op. cit. 69 Harv. L. Rev. at 625." (Emphasis added.)

Both **Cox v. Macy,** 152 N.Y.S. 858, 30 Labor Cases ¶69,869, and **DeRienzo v. Farrand Optical Co.,** 148 N.Y.S. (2d) 587, 30 Labor Cases ¶69,893, treat Sec. 9 (a) in similar fashion.

In addition to the foregoing cases there are a number of Federal cases which make it clear that no such "right" exists.

In **Independent Circulation Union v. Item Co.**, 163 F. Supp. 399, 401 (1958), 35 Labor Cases ¶71,711 (Dist. Ct., E.D. of Louisiana), the Court, holding that a labor union was entitled to bring an action under Sec. 301(a) of the Labor Management Relations Act to compel arbitration of a grievance arising out of the discharge of an employee, pointed out that the specific enforcement of the arbitration provisions of a collective bargaining contract involves "an obligation running to the union—a union controversy—and not uniquely personal rights of employees sought to be enforced by a union."*

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*The Court said, page 401:

"The Union thus seeks to bring this case within the union right doctrine of **Textile Workers Union of America v. Lincoln Mills of Alabama**, 353 U.S. 448, rather than the personal right doctrine of **Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp.**, 348 U.S. 437.

"It is now clear, as plaintiff contends, that a union under Section 301 of the Act has the right to have enforced the provisions of a collective bargaining agreement with respect to arbitration of grievances, even where those grievances involve the personal rights of the employees (citing cases) x x x

"Under those circumstances, it is said that the specific enforcement of the arbitration provisions of a collective bargaining contract involves 'an obligation running to a union—a union controversy—and not uniquely personal rights of employees sought to be enforced by a union.' **Textile Workers of America v. Lincoln Mills of Alabama**, supra, p. 460."

And further on in the opinion, the Court said:

"The employee group which signed the contract was a labor organization within the meaning of the Act, and the

To the same effect is the decision of the Circuit Court of Appeals for the Fifth Circuit in **Item Company v. New Orleans Newspaper Guild,** 265 F. (2d) 855, certiorari denied 358 U.S. 867.

Similarly, in **Steel Workers v. Pullman-Standard,** 241 F. 2d 547, the Court very clearly pointed out the difference between a union's asking for direct relief for an individual and its seeking to require an employer to arbitrate.

So, in **Copra et al v. Suro et al,** (C.C.A., First Circuit), 236 F. 2d 107, 30 Labor Cases ¶70,094, the Court held, citing many cases as authority, that an individual employee may not obtain specific performance of an agreement to arbitrate under the collective contract. See also: **Morgan Drive-Away, Inc. v. Teamsters,** 166 F. Supp. 885, 35 Labor Cases ¶71,869.

These cases were all decided after the Taft-Hartley Act, including the 9(a) proviso, had been enacted. Although the Supreme Court in the **Lincoln Mills** case expressly did not reach this issue, these other Federal decisions are controlling Federal law on this point.

The rationale of the Federal cases is exactly the same as that of the State cases, that the right to require arbitration is, except under a contract which

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right of arbitration which it is now seeking to enforce is an obligation running to the union and not a personal right as was sought to be enforced in Westinghouse." (Emphasis added.)

expressly provides otherwise,* a right which runs to the Union, **not** a uniquely personal or individual right, completely the reverse of the construction which Petitioners ask this Court to give to the 9(a) proviso.

The leading text-writers on this subject, Prof. Archibald Cox of Harvard and Prof. Charles O. Gregory of the University of Virginia, are in accord that **the proviso in Section 9 (a) confers no right on the individual employee to demand arbitration.**

Professor Cox in his article entitled "Rights Under A Labor Agreement," 69 Harvard Law Review, 601, 624, says:

> "**The obiter dictum** may be correct if 'the right to present grievances' is an Hohfeldian right cognizable by the courts and carrying correlative duties.** While this reading does no violence to the words, the internal evidence argues rather more strongly that the only effect of the proviso is to make it plain that the em-

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*As the Supreme Court of Errors for the State of Connecticut said in the instant case: "The agreement, unlike that in **Gilden v. Singer Mfg. Co.**, 145 Conn. 117, 118, 139 A.2d 611, does not contain language which affords to an employee the opportunity, personally, to seek arbitration."

"No doubt it is wise to channelize all individual grievances into the established procedure if the individual has an Hohfeldian right to present them, but I find it difficult to read into the statute a command that the employer and union must permit the right to be exercised through any machinery they establish to handle union grievances even though both are unwilling. Most decisions hold that the individuals cannot invoke contract machinery, which is created to resolve disputes between the company and the union. See pp. 629-630, 650-51 **infra."

ployer's duty to bargain exclusively with the representative designated by a majority of the employees is not violated if he chooses to receive grievances from individuals. The word 'right' is often used loosely to imply a privilege.[50] Prior to the Wagner Act employers had no legal obligation to receive grievances from individuals. Generally speaking, that act was not intended to enlarge the rights of individuals, and the failure to provide any remedy for a refusal to receive their complaints suggests that no enforceable right was intended. The sponsors of the Taft-Hartley amendment were more concerned with protecting individual employees against the union, but nothing was done to change section 9 (a) in any respect relevant to the immediate issue. The omission is entirely consistent with the general Taft-Hartley policy of enlarging the employer's rights and privileges with respect to the union in order to make him the protector of the individual employee. The office of a proviso is seldom to create substantive rights and obligations; it carves exceptions out of what goes before. In my opinion, therefore, section 9 (a) is entirely consistent with the view that an employer may lawfully promise the union not to process individual grievances and may also give the union the only legal right to compromise or enforce substantive obligations."

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[50]For example, in Texas & N.O.R.R. v. Brotherhood of Ry. Clerks, 281 U.S. 548, 570, (1930) and NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33-34 (1937) the Court spoke of the right to organize and bargain collectively as "a fundamental right" which antedated statutory recognition.

On the matter of legislative history of the proviso, Professor Cox says, 69 Harvard Law Review 624:

> "The legislative history of the proviso, both in 1935 and 1947, has been invoked in support of both conclusions. The 1935 discussions took place in hearings before congressional committees. The 1947 debate was thoroughly confused. Since the bits and pieces point in different directions, they throw too little light on the issues to be worth recounting here."

Plaintiffs have referred to the House and Senate Reports on Section 9 (a). They have, however, failed to refer to the Conference Report.* This Report does not speak in terms of employer duty (the Hohfeldian correlative to employee right). It speaks in terms of employer **authorization.** The earlier law had been construed to authorize the employer to confer with individual employees on grievances, although the **Hughes Tool** case had limited the power of the employer to settle or adjust these grievances. The new language in the proviso made it clear that employers were now "authorized" (but **not** re-

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*"Both the House bill and the Senate amendment amended Section 9 (a) of the existing law to specifically authorize employers to settle grievances presented by individual employees or groups of employees, so long as the settlement is not inconsistent with any collective bargaining contract in effect. The Senate amendment contained a further proviso, however, to the effect that the bargaining representative be given opportunity to be present at the adjustment of such grievance.

"The conference agreement follows the provisions of the Senate amendment." (House Conference Report #510 on H.R. 3020).

Agreed to by the Senate on June 6, 1947, 91 Cong. Record 6695.

quired) to not only confer with individual employees on grievances but also "to settle grievances thus presented," subject to the conditions contained in the proviso.

Professor Charles O. Gregory in his book entitled "Labor and The Law," (2nd Revised Ed. 1958), page 408 et seq, speaks of the 1947 proviso to the NLRA as follows:

> "At that time the Section 9 (a) proviso was amended **to permit** the final disposition of any grievance between an employer and an employee, as long as such disposition was 'not inconsistent' with the terms of the collective bargaining agreement and also provided that a representative of the union had a right to be present when the adjustment of the grievance was made."

Whatever right the proviso in Section 9 (a) may give, it is a right only with respect to the **presentation and voluntary adjustment** of grievances. Congress well knew the difference between a grievance which essentially involves negotiation or voluntary adjustment and an arbitration which calls for the decision of a third person.* Congress did not even

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*Congress specifically made it an unfair labor practice for an employer to refuse to bargain collectively (Section 8 (a) (5) (LMRA)). On the other hand, in Title II Section 201 of the same Act, Congress established the conciliation service and indicated that the purpose of it was to make available "full and adequate governmental facilities for conciliation, mediation, and voluntary arbitration to aid and encourage employers and the **representatives of their employees** to reach and maintain agreements concerning rates of pay, hours and working conditions . . .". (Emphasis

give to the certified bargaining representative the right to compel arbitration but left it for collective bargaining between the parties as to whether their agreement would or would not contain an arbitration clause.

Congress has stopped far short of imposing a scheme of compulsory arbitration upon employers and certified bargaining agents.* Accordingly, it is ludicrous to suggest that the privilege given to employees by the proviso in Section 9 (a) gives them the power to compel arbitration regardless of contract provisions. It is not to be wondered at that plaintiffs can find no cases to support their contention.

The contention advanced by plaintiffs has not been accepted by the Department of Labor†; by the

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supplied.) This declaration of policy shows clearly that arbitration is **not compelled** by statute but facilities are to be available to parties desiring them. Moreover, so far as any public policy is concerned, the foregoing quotation indicates that the policy is in favor of voluntary arbitration between the "employers and the representatives of their employees"—not between employers and individual employees.

*This point is discussed at length in **Refinery Employees Union of the Lake Charles Area v. Continental Oil Company**, U.S.D.C., Western Dist. of Louisiana, 160 F. Supp. 723, 35 Labor Cases ¶71,638, page 97,191, aff'd. (C.A. 5) 268 Fed. 447, 37 Labor Cases ¶65,504.

†In 1950 a form clause suggested by the Department of Labor stipulates: "It is further agreed that no grievance shall be negotiated by the company's representative directly with the employee or employees involved." [U. S. Bureau of Labor Statistics, Dept. of Labor, Bull. #908-10, Collective Bargaining Provisions 18 (1950)].

General Counsel of the NLRB*, by employers and unions in collective bargaining practice†, or by arbitrators‡.

Clearly, not only is such a construction not required,—it is not sensible.

There is, furthermore, a policy reason why the control of arbitration should be left with the collective bargaining agent and why a rule or construction should not be adopted which would leave the decision in the hands of the individual employee, regardless of the arbitration provisions of the collective bargaining agreement. It is the "majority rule" principle which is at the center of our labor law policy and which is recognized in the **Case** decision (**J. I. Case Co. v. NLRB**, 321 U.S. 332). As Mr. Justice Jackson said:

> "Advantages to individuals may prove as disruptive of industrial peace as disadvantages. They are a fruitful way of interfering with organization and choice of representatives; increased compensation if individually deserved, is often earned at the cost of breaking down some other standard thought to be for the welfare of the group, and always creates the suspicion of being paid at the long-range expense of the group as a whole."

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*General Counsel's Administrative Decisions, Case No. 418, CCH Labor Law Reporter ¶11,913 (1952); Case No. 317, CCH Labor Law Reporter ¶11,583 (1952); Case No. 834, CCH Labor Law Reporter ¶12,896 (1953).

†See Cox, Rights Under A Labor Agreement, 69 Harvard Law Review 601, 627-628.

‡See Cox, **ibid**, at pages 629-630.

To the same effect are the words of Cohen, J. in **Falsetti v. Mine Workers, Local 2026, supra,** wherein he said (page 70,701):

> "To view this type of agreement otherwise would lead to chaos and a breakdown in the entire scheme of collective bargaining for which the parties have provided and contracted. Instead of being able to rely on the disposition of employee grievances through the established machinery, the Company would face the constant threat of attempted individual enforcement through litigation. Union responsibility would be diminished and all parties would suffer. For these reasons, most, if not all, Union-management agreements of any magnitude in force throughout the Commonwealth are similarly drafted, with an eye toward reposing enforcement responsibility in the labor organization concerned."

Professor Cox, in his article in 8 Labor Law Journal 850, 855, **"Individual Enforcement of Collective Bargaining Agreements,"** points out that many grievances cannot be adjusted without making a rule for the future which will have important consequences for other employees, some of whom may have interests quite inconsistent with the individual grievant's wishes. He says:

> "(2) To allow the individual to press his own claim either in court or before an arbitrator would create a potential source of competition and discrimination that could be destructive of the entire structure of labor relations in the plant' x x x

"(3) The danger of rivalry and discrimination would tend to discourage union officials from adjusting grievances in the lower steps of the procedure. Suppose the business agent refused to press a grievance which he thought was unjust and then the employee had carried the case to court and secured a favorable decision. Would the business agent say 'no' to the next frivolous claim? Public officials and arbitrators no less than employers constantly remind union officials that they have a duty to discountenance disruptive and frivolous claims. Before they can be expected to accept this responsibility, the union officials should be given the power to make their decisions effective."

And further:

"In administering a collective bargaining agreement, however, the parties cannot wait until after the event to be told whether the individual or the union had power to handle the grievance. Unless parties are simply to disregard the law, the courts must formulate an approach which makes it possible for management to know **in the plant in advance** whether the individual or the union can make a binding settlement.".

It is clear that Professor Cox felt that the remedy to be given the individual employee was **not** the individual right to compel arbitration.*

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*To the same effect see note entitled "Rights of Individual Workers In Union & Management Arbitration Proceedings", 66 Yale Law Journal pp. 940, 953

Gregory, in his work, cited **supra,** pages 491-494, takes a similar approach. Professor Gregory says (p. 493):

> "Thus, in the collective interest it is apparent that the union should retain full control of arbitration, and be free to use its judgment concerning what cases to prosecute and how they should be presented. After all, the union has more than the continuing relationship with the employer to worry about. Arbitration is costly and time-consuming, and most unions have limited resources with which to handle and pay for their share of the arbitrator's fee and expenses. Such control by the union over arbitration does not completely eliminate the grievant from the picture, since under Section 9 (a) of the NLRA he may present and process any grievances directly with management."

The Courts, both Federal and State, have agreed with Professor Cox. There is no conflict of authority whatever.

III.

The Court Below Made No Finding of Any Failure on the Part of the Union to Represent the Employees Fairly. Had There Been Such a Finding Petitioners' Remedy Is Not Arbitration.

1. The case below was decided on Demurrer. The facts properly pleaded and admitted by the Demurrer are set forth in the Opinion of the Court below **(Appendix, Pages 12 and 13 of Petition).**

They include no finding of any bad faith or dereliction in the performance of its duty of fair representation on the part of the Union.

Accordingly, such a claim is not before this Court on this Petition.

2. The cases are clear that, even had the Union failed in its duty of fair representation, this does not give to the employees a right to demand arbitration which can not be found in the terms of the collective bargaining agreement. A neglect of duty on the part of the Union can not be the basis for a grant of additional employee rights against the Company. If the Union has failed in its obligations to its members then their remedy is against the Union, or possibly an action for damages against the employer based on breach of contract; the remedy is not the creation of a non-existent right in the employees to demand arbitration.

This is made abundantly clear in the opinion of Judge Burke in **Parker v. Borock, supra,** and in the concurring opinion of Judge Fuld in the same case. So, in **Pattenge v. Wagner Iron Works,** 275 Wis. 495, 32 Labor Cases ¶70,626, a damage action, the Court emphasized the fact that the individual could not demand arbitration as a matter of right.

And in **Falsetti v. Mine Workers, Local 2026, supra,** Cohen, J. said (page 70,701 et seq):

> "The aggrieved member-employee, limited to seeking relief against the Union, is not without effective remedy. In entering into this Agreement, the Union has assured the role of trustee

for the rights of its members and other employees in the bargaining unit. The employees, on the other hand, have become beneficiaries of fiduciary obligations owed by the Union. As a result, the Union bears a heavy duty of fair representation to all those within the shelter of its protection. See **Syres v. Oil Workers Union,** 350 U.S. 892, 76 S. Ct. 152, 100 L. Ed. 785 [29 Labor Cases ¶69,550] (1955), reversing per curiam 223 F. 2d 739 [28 Labor Cases ¶69,303] (5th Cir. 1955); **Ford Motor Co. v. Huffman, supra** at 337-339; Cox, **supra** at 632-638. If the Union, in processing an employee's grievance, does not act in good faith, in a reasonable manner and without fraud, it becomes liable in damages for breach of duty. In this way, the employee is recompensed for the harm he had suffered, and yet the process of collective bargaining in the industry is meaningfully preserved.

"Such would have been the proper theory upon which to proceed in the instant case. One of appellant's averments was that the Union representatives have arbitrarily refused to process his grievances in breach of their fiduciary duty. There is but one flaw in this reasoning. The fiduciary duty owed the member-employee is by the **Union,** and not by its individual representatives. Officials of the Union, acting in their authorized capacities, cannot be held individually liable in damages to a member-employee for failure to process a grievance since they are but agents responsible only to the Union itself.

It is the Union that is the proper target of appellant's complaint."

Various courts have given various remedies*. but

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*Courts have given employees the right to bring individual actions for damages where it is clear that the collective bargaining agent would not represent the employee fairly.

See: **Woodward Iron Co. v. Ware,** 261 F. 2d 138, (USCCA 5th); 36 Labor Cases ¶65,020.

They have allowed actions for wrongful discharge. **Hudak v. Hornell Industries,** 304 N.Y. 207 (1952). **Marranzano v. Riggs Nat'l. Bank,** 213 F. 2d 349. **Renzi v. Oertel Brewing Co. et al,** (Kentucky, 1958), 36 Labor Cases ¶65,118.

They have permitted employees to intervene in arbitration proceedings where the union was not properly protecting their rights. **In the Matter of Iroquois Beverage Corp.,** 159 N.Y.S. 2d 256 (1955).

Courts have refused to enforce arbitration awards until employees affected have had an opportunity to be present or to be heard in the proceedings. **In the Matter of Carolyn Laundry,** 129 N.Y.L.J. 2035 (1953). **Estes v. Union Terminal Co.,** 89 F. 2d 768 (5th Circuit).

Where conspiracy between the union and the employer is alleged a suit for damages has been permitted. **Crowell v. Palmer,** 134 Conn. 502.

That an action will lie against the Union under Section 8 (b) (3) of the National Labor Relations Act has also been suggested. **Cox, Fair Representation,** 2 Villanova Law Review 172.

In **Guszkowski v. U. S. Trucking Corp.,** (D.C. N.J.), 162 F. Supp. 847, the Court held that an individual employee might bring suit for damages in a federal court under the substantive law of the state in which the action arose, upon the basis of a wrongful discharge in breach of the provisions of a collective bargaining agreement, but pointed out that his claim for failure to exercise administration remedies was against the Union.

In the case of **Guzzo v. United Steelworkers of America, AFL-CIO,** California, Los Angeles Superior Court, March 29, 1960, 40 Labor Cases ¶66,430, a suit for damages against the union for breach of its duty of fair representation of the plaintiff member in arbitration proceedings, the court

no Court has held that the employee has a right to demand arbitration where such right is not given by the express terms of the collective bargaining agreement.

Thus, where the union can be shown to have been unfair, arbitrary or neglectful of the employee's interests, the employee is not without remedy. However, no court has given the employee the right which the contract itself has reserved to the union, the right to demand arbitration. The reasons for this are sound, lying both in the field of contract, in that the court will not rewrite the contract which the parties have made, and in the field of labor policy, in the recognition that because voluntary settlement of disputes without resort to outside arbitrators achieves greater industrial stability this curtailment of individual rights seems warranted. (See 66 Yale Law Journal 946, at pages 948, 952 and 954).

The Court below recognized the validity of these arguments and its decision should be upheld by a denial of certiorari.

IV.

The Cases Cited By Plaintiffs Are Not Controlling.

Plaintiffs have cited a number of Federal cases in their Brief in connection with their argument for

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recognized that there migh be both an action for breach of trust against the Union and also an unfair labor practice charge against the Union under the Labor Management Relations Act.

their construction of the proviso in Section 9 (a). All of these cases are discussed by Professor Cox in his articles in 69 Harvard Law Review 601 and in 8 Labor Law Journal 850.

While it is true, as pointed out by plaintiffs at Page 14 of their Brief, that Professor Cox said in 1948 that under the **language** of the **Hughes Tool** decision by the Board any dissatisfied party could carry a grievance through the entire grievance machinery, including any final arbitration for which the agreement might provide, he points out at Page 624 of his article in 69 Harvard Law Review that this is **obiter dictum** and he then points out why, in his opinion, it is incorrect.

The **Hughes Tool Company** case, 147 Fed. (2d) 69, held only that the Company might continue to discuss and settle individual grievances with individual employees but that the collective bargaining representative must be notified so that it could be present at the settlement of the grievances.

There is, of course, neither in the Board decision or in the C.C.A. decision any question of arbitration nor is it mentioned.

Professor Cox discusses **Elgin, J. & E. Ry. v. Burley,** 325 U.S. 71 (1945), affd. on rehearing, 327 U.S. 661 (1946) and the language referred to at Page 10 of plaintiffs' Brief, at 69 Harvard Law Re-

view 635, and shows why the decision governs only cases arising under the Railway Labor Act.*

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*"Although much of Mr. Justice Rutledge's reasoning, including the quoted passage, points in the direction of a similar ruling under the NLRA, I am inclined to think that the **Elgin** case should not be regarded as a definite precedent on the issues in this paper. Since the case arose under the Railway Labor Act, which establishes a special statutory procedure for adjusting grievances and gives specific procedural rights to individual employees, the only issue was whether Congress intended to vest the sole power to settle grievances in the unions withou regard to the wishes of the unions the employees, or the employers. Under the NLRA the parties are left to establish by contract any machinery for interpretation and enforcement of their agreements. The issues therefore are: (1) whether public policy forbids an employer and union to negotiate an agreement under which all contract rights run to the union as trustee; and (2) what character of rights a particular agreement should be construed to create in the event that the NLRA and public policy do leave the question to private contract. Since the **Elgin** case was decided by a bare majority over the dissent of four Justices, the difference opens the way to arguing these two issues as original questions in the event that they come before the federal courts. For the same reasons state courts need not regard the case as a binding expression of federal policy.

"Outside the field of railway labor there are a number of opinions whose philosophy is opposed to the **Elgin** case and one which supports it."

Professor Cox then discusses these cases and states:

"In sum, the precedents applicable to grievances not covered by the Railway Labor Acts are divided and inconclusive. The choice of a rule will turn upon the court's evaluation of the considerations set forth earlier in this subsection. The relationship between law and industrial relations will be improved and collective bargaining will work better, in my opinion, without any sacrifice of the interests of individual employees, if contracts which contemplate active administration through a grievance and arbitration procedure controlled by the union are held to vest the power to settle grievances in the collective bargaining representative subject to its fiduciary duty of fair representation."

The **North American Aviation** decision, 136 F. 2d 898 (1943), construes a particular contract provision and is not a holding on the point involved in the instant case.

CONCLUSION.

There is no issue of substance in this case. The decision of the Supreme Court of Errors represents only the construction to be given to a particular clause of a particular contract and is in accord with similar decisions throughout the United States.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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